IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

GARY WELSH,

Petitioner-Appellant,

v. No. 80-1362

LARRY MIZELL, Warden Vienna Correctional Center, Vienna, Illinois, and TYRONE C. FAHNER, Attorney General of the State of Illinois,*

Respondents-Appellees.

Appeal from the United States District Court for the Southern District of Illinois, Benton Division.
No. CV 80-4104 — William L. Beatty, Judge.

ARGUED SEPTEMBER 18, 1981 — DECIDED JANUARY 12, 1982

Before CUMMINGS, *Chief Judge,* SWYGERT, *Senior Circuit Judge,* and BAUER, *Circuit Judge.*

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* William J. Scott, one of the original defendants, was succeeded by Tyrone C. Fahner. See Rule 25(d) of the Federal Rules of Civil Procedure.

CUMMINGS, *Chief Judge.* Gary Welsh is a prisoner at the Illinois Correctional Center in Vienna, Illinois. The murder of which he was convicted was committed in 1962, but Welsh was not competent to stand trial until 1973. At that time he was sentenced in the Circuit Court of McHenry County to a prison term of sixty to one hundred years. His direct appeal was denied, *People v. Welsh,* 30 Ill. App. 3d 887, 333 N.E.2d 572 (2d Dist. 1975). He has served his minimum sentence, with allowance for statutory good time, in several state mental hospitals and in prison. He has been denied parole nine times.

In March 1980 Welsh filed a *pro se* petition for a writ of habeas corpus. He contended that Illinois' statutory and regulatory parole criteria had changed significantly between 1962, when he committed his crime, and 1973, when new legislation took effect. In 1962 the emphasis had been on preventing further crimes by the particular candidate for parole (special deterrence). The 1973 criteria reflected instead a philosophy of general deterrence — that a prisoner should not be paroled so long as his incarceration might deter other potential offenders. The application of the new parole criteria to him, Welsh argued, contravened the *ex post facto* clause of the United States Constitution.[1]

The district court dismissed Welsh's petition on the motion of the Attorney General of Illinois. Judge Beatty reasoned that the changes in parole criteria were procedural and that procedural changes do not violate the *ex post facto* clause when they "operate only in a limited and unsubstantial manner to [the petitioner's] disadvantage." May 22, 1980 order,

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[1] "No State shall * * * pass any * * * ex post facto Law." U.S. Const., Art. 1 § 10, cl. 1. A similar clause applies to the federal government. Art. I, § 9, cl. 3. The Illinois Constitution contains a like provision in Art. 1 § 16.

p. 2 (quoting *Beazell v. Ohio*, 269 U.S. 167,170). He assumed that the Parole and Pardon Board (now the Illinois Prisoner Review Board) had always had broad discretion to grant or deny parole and that Welsh therefore could not show how the changed provisions caused him cognizable harm. *Id.* at 3. This appeal followed. For the reasons set out below, we reverse and remand to the Illinois Prisoner Review Board with instructions to give prompt consideration to Welsh's parole application under the statute and regulations applicable in 1962.

The Doctrine of Exhaustion of Remedies Is Inapplicable.

We are met at the threshold by a jurisdictional question. The state has argued, although the point was not pressed on appeal, that Welsh's petition should be dismissed for failure to exhaust state remedies. There are two reasons for not requiring exhaustion. First, the state has expressly waived it. In urging this Court to deny Welsh's motion for a stay, the state claimed to have shown by its original motion to dismiss that "although petitioner had not gone to the state courts for relief * * * *it would have been futile for him to do so,*" (emphasis added).[2] Second, even without the state's waiver, sending Welsh back to the state courts would be an exercise in futility, which federal habeas procedure allows us to pretermit. An Illinois appellate court has recently rejected a challenge identical to Welsh's, *Harris v. Irving*, 90 Ill. App. 3d 56, 412 N.E.2d 976 (5th Dist. 1980), and the Illinois Supreme Court denied leave to appeal that decision on January 30, 1981. Thus "there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner," 18 U.S.C. § 2254(b).

[2] January 30, 1981, response to Petitioner-Appellant's Motion for Stay.

The Ex Post Facto Clause Was Violated.

In its most recent explication of the *ex post facto* clause, the Supreme Court has said:

> The *ex post facto* prohibition forbids * * * the States to enact any law "which imposes a punishment for an act which was not punishable at the time it was committed, or imposes additional punishment to that then prescribed." * * * [T]wo critical elements must be present for a criminal or penal law to be *ex post facto;* it must be retrospective, that is, it must apply to events occuring before its enactment, and it must disadvantage the offender affected by it.
>
> *Weaver v. Graham,* 450 U.S. 24, 28, 29 (citations and footnotes omitted)

We begin our inquiry therefore by looking at the criteria for parole in effect in September 1962, when Welsh committed the crime for which he was sentenced. They were contained in Sections 6 and 7b of the Parole Law. Ill. Rev. Stat. 1961, ch. 38 §§ 806,808a. Cf. Ill. Rev. Stat. 1961, ch. 127 § 55b. Section 6 required the sentencing judge and the State's Attorney to transmit to the Parole Board an official statement of all "facts or circumstances which may tend to throw light on the question as to whether such prisoner * * * is capable again of becoming a law-abiding citizen." Section 7b required the Parole Board to give "due consideration and weight * * * to the record of the prisoner's conduct kept by the superintendent or warden."

The regulations issued by the Parole Board sounded similar themes. For example,

> 12. If the members of the Parole and Pardon Board in conference determine that a prisoner serving an indeterminate sentance is entitled to parole, they shall

enter an order for parole. If they determine that a prisoner is not a fit person to serve his sentence outside the penitentiary, parole shall be denied, and such further order entered as in the judgment of the members is warranted.

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14. In its consideration of the question of whether a prisoner should be paroled, the Parole and Pardon Board shall evaluate all the factors in each case, including the prisoner's conduct record, and grant or deny release on parole in accordance with its judgment.

Thus the focus of the Parole Board's inquiry was on the prisoner himself, as observed by the prosecuting and sentencing authorities and by prison officials. The purpose of incarceration had been served — and parole was appropriate — when the individual prisoner was deterred from engaging in further criminal activity and his conduct demonstrated his rehabilitation. The severity of the offense committed and society's concern with sufficient punishment did not enter directly into the Parole Board's decision. Those factors had already determined the minimum and maximum prison terms imposed by the sentencing judge. The minimum sentence was intended to satisfy society's desire for adequate punishment; the maximum sentence was a rough indicator of when rehabilitation could be presumed. The function of parole was to mediate between the two extremes. *People v. Moore*, 133 Ill. App. 2d 827, 829, 272 N.E.2d 270, 271 (5th Dist. 1971); *People v. Lillie*, 79 Ill. App.2d 174, 178, 223 N.E.2d 716, 718-719 (5th Dist. 1967).

In 1972 the Illinois legislature enacted new parole criteria based on the Model Penal Code. These criteria, which took effect on January 1, 1973, provide for the denial of parole if:

> (1) there is substantial risk that [the prisoner] will not conform to reasonable conditions of parole; or
>
> (2) his release at that time would deprecate the seriousness of his offense or promote disrespect for the law; or
>
> (3) his release would have a substantially adverse effect on institutional discipline. Ill. Rev. Stat. 1973, ch. 38, § 1003-3-5(c) (Ill. Rev. Stat. 1979, *id.*)

Criteria (1) and (3) invite the Parole Board to look at many of the same factors as under previous law. Criterion (2), however, is a marked departure, importing for the first time into the parole decision considerations of retributive justice (the relationship between time served and the nature of the offense) and general deterrence (incarceration as a means of promoting general respect for law). [3] Furthermore, the

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[3] This shift is illustrated by the comments of Theodore P. Fields, chairman of the Parole and Pardon Board from January 1971 to August 1972, in 62 Ill. B.J. 22 (1973):

> The second statutory ground for denial breaks down into two categories of principles that exist in our system of criminal justice: "His release at that time would deprecate the seriousness of his offense" means simply, under our present standards, has the man who committed a certain crime served a reasonable enough time considering the nature of the crime * * * The second category is that "his release at that time would . . . promote disrespect for the law." This relates to the principle of deterrence. If an offender is released at too early a date as compared with the nature of the crime committed, others would feel there is no reason they should worry about committing such crimes because there wouldn't be much of a penalty to be suffered * * * Also, for a viable system of criminal justice, it is necessary for the public to have confidence in and respect for the law * * * The length of time served for particular offenses is currently one of the elements that does have an overall effect on the public in its respect for the law.

statute allows any one of the criteria to serve as a basis for parole denial. Not only is criterion (2) new, therefore, but it can also be determinative. The district court failed to recognize that Welsh's petition presented exactly that case: the Parole Board gave only the second of the three factors as its reason for denying parole,[4] and that factor could not have had decisive weight under the Board's 1962 procedures.

It thus appears that the change in law has worked a substantial harm to Welsh. At the time of his offense, exemplary conduct during his imprisonment might well have resulted in parole. Under the later enactment, no evidence of satisfactory rehabilitation can overcome a finding that the nature of his crime makes him a socially undesirable candidate for parole. This change satisfies both prongs of the *Weaver* test: it is retrospective and it disadvantages Welsh. It would also satisfy older, more restrictive formulations of the test for an *ex post facto* violation, which require a direct, after-the-fact enhancement of punishment. Section 1 of the Parole Law in effect at the time Welsh committed his crime stated:

> It shall be deemed and taken *as part of every sentence*, as fully as though written therein, that the Parole and Pardon Board, by and with the approval of the Governor in the nature of a release or commutation of sentence * * * may terminate the term of such imprisonment * * * earlier than the maximum fixed by the court * * *
>
> Ill. Rev. Stat. 1961 ch. 38 § 801 (as amended by H.B. No. 343, 1961, Ill. Laws) (emphasis added)

The Supreme Court has also warned that a "repealer of parole eligibility" may amount to a "greater or more severe *punishment* than was prescribed by the law at the time of the * * * offense." Sounding in a pragmatic note, Justice Brennan wrote,

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[4] Exhibit 1 to petition for writ of habeas corpus.

"[O]nly an unusual prisoner could be expected to think that he was not suffering a penalty when he was denied eligibility for parole." *Warden v. Marrero*, 417 U.S. 653, 662-663 (emphasis in original; citations omitted). *Accord, Rodriguez v. United States Parole Commission*, 594 F.2d 170, 176 (7th Cir. 1979).

We find considerable support for our holding that the change from special deterrence criteria to general deterrence criteria is substantial and that the retrospective application of the general deterrence criteria violates the *ex post facto* clause. In *Weaver v. Graham, supra*, 450 U.S. 24, a Mississippi statute that changed the computation of "gain time credits" violated the *ex post facto* clause. In *Lindsey v. Washington*, 301 U.S. 397, legislation that amended a discretionary fifteen-year sentence to a mandatory fifteen-year term could not be given retrospective effect. In *Greenfield v. Scafati*, 277 F. Supp. 644 (D. Mass. 1967) (3-judge court), affirmed, 390 U.S. 713, legislation that made "good conduct deductions" forfeit if parole conditions were violated could only be constitutionally applied to prisoners whose crimes were committed after the statute was enacted.

In addition, several courts of appeals have held that federal parole criteria, amended in 1976 to include depreciation of the seriousness of the offense, tendency to promote disrespect for the law, and jeopardy to the public welfare, could not be applied to youthful offenders whose crimes were committed before that date. The Youth Corrections Act had, until the 1976 amendments, focused on "a mental and physical examination to ascertain [the youthful offender's] personal traits, his capabilities, pertinent circumstances of his family life, any previous delinquency or criminal experience, and any mental or physical defect or other factor contributing to his delinquency." *Shepard v. Taylor*, 556 F.2d 648, 653 (2d Cir. 1977) (summarizing 18 U.S.C. § 5014). *Accord, Marshall v.*

Garrison, 659 F.2d 440, 444-446 (4th Cir. 1981); *DePeralta v. Garrison*, 575 F.2d 749 (9th Cir. 1978). While Youth Corrections Act precedents are not automatically transferrable to parole challenges by adult offenders, the changes wrought by the Illinois legislature are of a sufficient magnitude to render these cases apposite. The shift in criteria is, for example, more marked than was true in *Ruip v. United States*, 555 F.2d 1331 (6th Cir. 1977), were no *ex post facto* violation was found.[5]

There are decisions in which *ex post facto* challenges virtually identical to Welsh's have been made but without success. See, *e.g.*, *United States* ex rel. *McCalvin v. Irving*, No. 80 C 1522 (N.D. Ill. 1981); *United States* ex rel. *Overall v. Director*, No. 74 C 2541 (N.D. Ill. 1974), affirmed without opinion, 513 F.2d 634 (7th Cir. 1975); and *People v. Harper*, 27 Ill. App. 3d 406, 327 N.E.2d 91 (5th Dist. 1975) (abstract).

We think the reasoning in these cases is flawed, as Judge Beatty's was here, by two misconceptions. First, the prisoner does not have to show that he had a vested right to be paroled. That showing would be necessary for a contract clause or due process challenge, but it is not relevant to an *ex post facto* claim. *Weaver v. Graham*, *supra*, 450 U.S. at 29-30, is now dispositive on that point. Second, it is not an answer to an *ex post facto* challenge to say that parole is a matter of "legislative grace." As Judge Aldrich noted in *Greenfield v. Scafati*, *supra*, 277 F. Supp. 644, 646:

> It is true that parole is commonly spoken of as a matter of grace, and not of right. * * * It would be more accurate, however, to say that a prisoner's en-

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[5] In *Ruip*, the prisoner was challenging the 1973 federal parole guidelines. Under those guidelines the United States Parole Commission identified nine personal characteristics and six categories of offense severity. It assigned the prisoner scores for each characteristic and a rating for offense severity, and granted or denied parole based on both factors.

> titlement to parole lies in the discretion of the parole board. It would not follow because a prisoner might not receive parole that it would not be an unlawful ex post facto burden to deprive him altogether of the right to be found qualified.

Even discretionary decisions are made under some constraints. We hold only that the constraints on the Parole Board's discretion in Welsh's case must be those contained in the statute and regulations that were in effect in 1962, not those subsequently enacted.

Remand to the Illinois Prisoner Review Board is the Appropriate Remedy

Welsh has argued that we should either order his immediate release, since the only ground for the most recent denial of his parole was constitutionally inapplicable, or remand his case to the Prisoner Review Board for reconsideration under the relevant guidelines. A remand is clearly the appropriate relief. *See Weaver v. Graham, supra*, 450 U.S. at 36-37, and *People* ex rel. *Jones v. Brantley*, 45 Ill. 2d 335, 337 259 N.E.2d 33, 34 (1970). If the Board denies parole yet again, it must — as the state acknowledges (Br. 6) — give its reasons in order to satisfy the due process requirements of *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1,15,16.

Reversed and remanded for further proceedings consistent herewith.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

GARY WELSH,

Petitioner,

vs.

LARRY MIZELL, Warden Vienna Correctional Center, Vienna, Illinois, and
WILLIAM J. SCOTT,
Attorney General of the State of Illinois,

Respondents.

No. CV 80-4104

ORDER

Petitioner, Gary Welsh, was found guilty of murder by a jury in McHenry County and was sentenced to a term of 60 to 100 years in the penitentiary. On September 25, 1979, petitioner was denied parole on the basis that his release "would deprecate the seriousness of the crime and promote disrespect for the law" as was proper under Illinois Revised Statutes, 1977, Chapter 38 Section 1003-3-5(c). Since the crime was committed long before this statute was passed, petitioner contends the parole statute was an impermissible *ex post facto* law and so the use of it violated his constitutional rights. On March 12, 1980, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2254. The Attorney General of Illinois has filed a motion to dismiss claiming the absence of any violation of the *ex post facto clause*. We agree.

The enactment of Illinois Revised Statutes, 1977, Chapter 38 Section 1003-3-5(c) amounted to a change in the Illinois Parole Board's procedure as to granting parole and normally the prohibition against *ex post facto* laws "applies only to

changes in substantive law, and not to changes in procedure." *James v. Twomey*, 466 F.2d 718, 721 (7th Cir. 1972). Some changes in procedure, though, can operate in such a way as to fall within the *ex post facto* law prohibition:

> "And there may be procedural changes which operate to deny to the accused a defense available under the laws in force at the time of the commission of his offense, or which otherwise affect him in such a harsh and arbitrary manner as to fall within the constitutional prohibition. *Kring v. Missouri*, 107 U.S. 221, 2 S.Ct. 443, 27 L.Ed. 506; *Thompson v. Utah*, 170 U.S. 343, 15 S.Ct. 620, 42 L.Ed. 1061. But it is now well settled that statutory changes in the mode of trial or the rules of evidence, which do not deprive the accused of a defense and *which operate only in a limited and unsubstantial manner to his disadvantage, are not prohibited.*" (Emphasis Added.) *Beazell v. State of Ohio*, 269 U.S. 167, 170, 46 S.Ct. 68, 69 (1925).

Courts have held changes in procedure to be a violation of the prohibition against *ex post facto* laws. *Kring v. Missouri*, 107 U.S. 221, 2 S.Ct. 443 (1883), *U.S. v. Henson*, 486 F.2d 1291 , (D.C. Cir. 1973). Other courts have held that a procedure change is not a violation for it operates only in "an unsubstantial manner to the persons' disadvantage." *Beazell v. State of Ohio*, 269 U.S. 167, 46 S.Ct. 68 (1925), *Graham v. Thompson*, 246 F.2d 805 (10th Cir. 1957), *Payne v. Nash*, 327 F.2d 197 (8th Cir. 1964).

Under Illinois Revised Statutes, 1961, Chapter 38, Section 807, effective January 1, 1962, "the Parole and Pardon Board shall establish rules and regulations, not inconsistent with this Act . . . and shall issue paroles in accordance with the provisions of this Act and of such rules and regulations adopted hereunder."

The express language of this statute and the courts over the years, in interpreting the Illinois Parole Statutes, have consistently ruled that the issuance of a parole in Illinois is at the discretion of the Parole and Pardon Board.[1] *People v. Kinney*, 30 Ill. 2d 201, 195 NE 2d 651 (1964) (interprets the Illinois Revised Statutes of 1961); *People Ex Rel Jones v. Brantley*, 259 NE2d 33 (1970) interprets the Illinois Revised Statutes of 1967); *People Ex Rel Tucker v. Kotsos*, 42 Ill. App. 3d 812, 356 NE2d 798 (1st Dist. 1976), (interprets the Illinois Revised Statutes of 1975).

The issuance of a parole was at the discretion of Parole & Pardon Board in 1961 and was still at the discretion of the Parole & Pardon Board in 1979. The new statute has not impinged on the Board's discretion. The enactment of Illinois Revised Statutes 1977 Chapter 38, Section 1003-3-5(c), only serves to clarify the Board's decision making process in issuing paroles and does not add to or subtract from what the Parole and Pardon Board may consider in making its decision. The Board could have, twenty years ago, considered the effect a parole would have on deterring potential criminals.

The United States Court of Appeals for the Seventh Circuit considered possible violations of the *ex post facto clause* in dealing with amendments to the Illinois Parole Act and found no constitutional violation due to the great discretion given to Parole & Pardon Board in Illinois:

> "Parole is a matter of clemency and grace. No federal constitutional question is involved in the administration of the Illinois Parole Act." *Faines v. Castle*, 226 F.2d 591 (7th Cir. 1955).

Due to this great discretion given to the Parole & Pardon Board, this Court cannot find that the petitioner was at a substantial disadvantage due to the change in the statute and so there was no violation of the prohibition against *ex post facto* laws.

Therefore, the Illinois Attorney General's Motion to Dismiss is hereby granted.

IT IS SO ORDERED.

DATED: This 22 day of May, A.D. 1980.

UNITED STATES DISTRICT JUDGE

NOTE: CLERK TO SEND COPIES TO ALL PARTIES.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604
February 10, 1982

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. LUTHER M. SWYGERT, Senior Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge

GARY WELSH,
Petitioner-Appellant,

No. 80-1862 vs.

LARRY MIZELL,
Warden, Etc., and
TYRONE C. FAHNER,
ATTORNEY GENERAL,
Respondents-Appellees.

Appeal from the United States District Court for the Southern District of Illinois, Benton Division
No. CV 80-4104
William L. Beatty, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by respondents Mizell and Fahner, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

STATE OF ILLINOIS
PRISONER REVIEW BOARD
JAMES R. IRVING Chairman

September 25, 1979

To: Gary Welsh C-06380 Vienna

The basis for the Board's decision denying you parole at this time is explained as follows:

> Parole is denied based on the extreme seriousness of the crime of murder. The Board believes your release at this time would deprecate the seriousness of the crime and promote disrespect for the law.

AFFIDAVIT

I, W. V. Kauffman, Jr., Executive Director of the Prisoner Review Board and keeper of the records thereof, attest that the attached documents are true and correct copies kept in the normal course of business in our individual inmate files.

Specifically, we have randomly located files of individuals who were denied parole prior to January 1, 1973, who were given reasons for their parole denials relating to the seriousness of their offenses. These were taken from the files of Edwin J. Conrad, Waldo Emmerson Granberry, Charles Abrams, and Cottrell Caldwell.

The undersigned has served in the present capacity since 1967. The Board, to the best of my recollection, began reciting reasons for its actions in late 1970, although it was not Statutorily required to do so until January 1, 1973.

/s/ W. V. Kauffman, Jr.
W. V. Kauffman, Jr.
Executive Director

Subscribed to and sworn before me this 14th day of September, 1981.

/s/ Rosemary Drehing
NOTARY PUBLIC

PAROLE AND PARDON BOARD

To: The Warden
From: The Parole & Pardon Board
In Re: Edwin J. Conrad #46717
(Inmate's name & number)
Hearing Date: March 1, 1971 — Stateville

When rendering its decision in the case of the above inmate, the Board members offered the following comments:

Because of the very serious nature of the crime, his previous criminal activity, the absence of any sense of guilt and consequently, remorse; the absence of insight into previous behavior, it is the feeling of the Board that he is not an acceptable risk for parole. The Board is fully aware that this is an excellent inmate within the institution and that he performs quite well here. Yet, the inmate's persistent denials of an especially heinous crime indicate somewhat to the Board the absence of rehabilitation.

PAROLE AND PARDON BOARD

To: The Warden
From: The Parole & Pardon Board
In Re: Edwin J. Conrad #46717
(Inmate's name & number)
Hearing Date: March 1, 1972

When rendering its decision in the case of the above inmate the Board members offered the following comments:

In reviewing this case, the Board wishes to acknowledge that there have been certain achievements made by this inmate during his incarceration. However, in reviewing the seriousness of the offense for which he was convicted and the sentence imposed by the Court, it would be the Board's order at this point that parole be denied.

PAROLE AND PARDON BOARD

To: The Warden
From: The Parole & Pardon Board
In Re: Edwin J. Conrad #46717 — Stv.
(Inmate's name & number)
Hearing Date: November 2, 1972

When rendering its decision in the case of the above inmate the Board members offered the following comments:

The total lack of insight expressed by the inmate coupled with the seriousness of the offense causes the Board to feel that parole at this time would depreciate the seriousness of the offense.

The Board would suggest that Staff evaluate this man for possible placement in a therapy program that might enable him to develop insight into his own personal problems.

PAROLE AND PARDON BOARD

To: The Warden
From: The Parole & Pardon Board
In Re: Waldo Emmerson Granberry #46678
(Inmate's name & number)
Hearing Date: April 7, 1971 — Stateville

When rendering its decision in the case of the above inmate, the Board members offered the following comments:

Because of the serious nature of these crimes, parole is denied.

The Board commends the inmate on his excellent adjustment and accomplishment, and encourages him to continue.

PAROLE AND PARDON BOARD

To: The Warden
From: The Parole & Pardon Board
In Re: Waldo Emmerson Granberry—Joliet #46678
(Inmate's name & number)
Hearing Date: March 1, 1972

When rendering its decision in the case of the above inmate the Board members offered the following comments:

In view of the extreme seriousness of the instant crimes, involving the taking of a human life and actual assaults, and in view of the lack of insight exhibited by the inmate in the interview situation, the Board finds that the inmate is not an acceptable risk for parole at this time.

PAROLE AND PARDON BOARD

To: The Warden
From: The Parole & Pardon Board
In Re: Charles Abrams, #54147, Stateville
(Inmate's name & number)
Hearing Date: February 29, 1972

When rendering its decision in the case of the above inmate the Board members offered the following comments:

The Board is aware of the inmate's accomplishment in the Malaria Program, Dr. Rappaport's Group Therapy and the educational field. The Board is also aware of the minimum security placement of the individual; however, the Board feels that his past record of involvement in law violation's starting when he was a juvenile coupled with his drug addiction and the seriousness of the present offense makes him an unsuitable risk for parole at this time.

PAROLE AND PARDON BOARD

To: The Warden
From: The Parole & Pardon Board
In Re: Cottrell Caldwell 51713-J
(Inmate's name & number)
Hearing Date: November 10, 1970

When rendering its decision in the case of the above inmate the Board members offered the following comments:

Parole denied.

In view of the nature of the crime and the inmate's past record evidencing an assaultive behavior pattern and aggressive tendencies as well as the continued guarded prognosis, the Board does not feel that he is an acceptable parole risk at this time.

PAROLE AND PARDON BOARD

To: The Warden
From: The Parole & Pardon Board
In Re: Cottrell Caldwell #51713 Joliet Branch
(Inmate's name & number)
Hearing Date: November 11, 1971

When rendering its decision in the case of the above inmate the Board members offered the following comments:

In cognizance of the fact that this inmate murdered his female companion, and in further recognition of the fact that he had shot a previous wife five times and had committed other threats and assaults upon women, it is the opinion of the Board that he is not an acceptable parole risk, and it is the order of the Board that parole be denied in the interest of the peace and tranquility of the community.

PAROLE AND PARDON BOARD

To: The Warden
From: The Parole & Pardon Board
In Re: Cottrell Caldwell Pontiac No. 32207
(Inmate's name & number)
Hearing Date: September 14, 1972

When rendering its decision in the case of the above inmate the Board members offered the following comments:

In view of the seriousness of the offense, other crimes of violence in his past & his lack of academic, vocational, counseling or therapeutic achievements, it is the finding of the Board that he is not rehabilitated & would not comply with reasonable conditions of parole at this time.

No. 74-288

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, *Respondent-Appellee,* v. ANDREW HARPER, *Petitioner-Appellant.*	Appeal from the Circuit Court of Johnson County, Illinois Honorable Robert B. Porter, Judge Presiding

PER CURIAM

Petitioner-appellant, Andrew Harper, and John Holmes, Jr., were convicted jointly in Cook County of murder and were sentenced to death. On appeal, the Supreme Court reversed the convictions and remanded the cause for a new trial. *People v. Harper*, 35 Ill.2d 398, 223 N.E. 2d 341 (1967). Both were again convicted and sentenced to 30 to 50 years. Harper's sentence was to run concurrently with a sentence of 100 to 150 years imposed for a prior murder conviction.

Petitioner is currently incarcerated in the Illinois Department of Corrections Correctional Center, Vienna, Illinois. He made application to the Illinois Parole and Pardon Board for parole on both offenses. On December 12, 1973, his application for parole was denied by the Board. The Board stated that parole at that time would "deprecate the seriousness of the offense" and "would not deter the inmate or others from committing such serious offenses."

On March 22, 1974, appellant filed a *pro se* petition for a writ of habeas corpus in the circuit court of Johnson County alleging that the Parole and Pardon Board, in denying his application for parole, had applied a standard which did not exist at the time of his sentence and that, therefore, he remained incarcerated through the application of an *ex post facto* law. The circuit court held a hearing on the petition, at which the appellant was present, and on May 1, 1974, granted the People's motion to dismiss and denied the petition. This appeal followed.

The Office of the State Appellate Defender, Mt. Vernon, counsel petitioner on appeal, filed a motion pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), requesting leave to withdraw as counsel, alleging that no merit to the appeal exists. Counsel has provided this court with an extensive memorandum of law in support of its position and has served petitioner with copies of all documents. The appellant has requested that his petition for writ of habeas corpus filed in the Circuit Court be permitted to stand as his Brief and Argument on appeal.

We have carefully reviewed the record and agree with counsel that no merit exists. Appellant's petition sought a writ of habeas corpus pursuant to Ill. Rev. Stat. 1969, ch. 65, sec. 22(2) and (3). Examination of the petition reveals that the appellant relies solely on subsection (2), and alleges that, absent the wrongful application of an *ex post facto* law, he would be entitled to discharge. Assuming, *arguendo*, that an *ex post facto* law was applied by the Board in denying the appellant parole, he still would not be entitled to discharge. At most, he would be entitled only to reconsideration of his parole application. *People ex rel. Jones v. Brantley*, 45 Ill.2d 335, 258 N.E.2d 33 (1970). The appellant was entitled to have his application for parole considered under the proper standards or criteri. We are aware of *People ex rel. Weaver v. Lango*, 57 Ill.2d 67, 309 N.E.2d

531 (1974), wherein the court granted mandamus relief to one denied parole based on improper eligibility criteria. The Court noted, however, that the petitioner had been denied consideration *pro forma* and that the extent of his relief was consideration of his parole application on its merits. In the instant case, petitioner has been afforded the consideration provided by statute and Parole and Pardon Board regulations. Thus, neither habeas corpus nor mandamus relief is available. The motion of the State Appellate Defender to be allowed to withdraw as counsel on appeal is allowed and the judgment of the Circuit Court of Johnson County is affirmed.

AFFIRMED.

Publish Abstract only.

CONCUR: _____

Eberspacher, J. and Moran, J., not participating.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA *ex rel.*
AARON OVERALL, JR.,

Petitioner,

vs. NO. 74 C 2541

DIRECTOR, DEPARTMENT OF CORRECTIONS,
STATE OF ILLINOIS,

Respondent.

MEMORANDUM OPINION

Petition for Writ of Habeas Corpus

Petitioner Aaron Overall is a state prisoner in the custody of the Department of Corrections of the State of Illinois pursuant to a 6 to 14 year sentence imposed by the Circuit Court of Cook County. The petitioner entered a plea of guilty to a reduced sentence of voluntary manslaughter in exchange for the sentence imposed.

Petitioner claims that at the time he accepted the consequences of his guilty plea one of the conditions of the sentence

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United States ex rel. Aaron Overall v. Director, Dept. of Corrections 74C 2541.

Petitioner's application for a writ of habeas corpus is denied. First, we believe petitioner has construed former §203 of the parole statute in an unlikely and impermissibly narrow manner, and second, we find that petitioner's contention as to the voluntariness of his guilty plea must fall for failure to exhaust state remedies. Further, we hereby grant a certificate of probable cause should counsel wish to appeal the denial of his writ.

then imposed was that, after having served his minimum sentence and becoming eligible for parole, parole would be granted when the Parole Board had determined that petitioner was "capable again of becoming a law abiding citizen." Ill. Rev. Stat. ch. 108, §203 (1969). Subsequent to the entry of petitioner's guilty plea the parole statute was revised to permit the Parole Board to deny parole if it determined that release would "deprecate the seriousness of the offense." Ill. Rev. Stat. ch. 38, §1003-3-5 (c)(2) (1973).

In April, 1974, petitioner had become eligible for parole and appeared before the Parole Board for a hearing on the granting of parole. Petitioner was denied parole and was presented with the following statement:

> The Board in considering this case feels that parole at this time would deprecate the seriousness of the offense and would not deter the inmate nor others from committing such serious violations of the law in the future.
>
> It is therefore the order of the Board that parole be denied, continued to the April 1975 docket. The Board would recommend and encourage the inmate to become involved in the educational programs offered within the institution, more specifically the GED program.

Petitioner sought reconsideration from the Parole Board and argued that the promise to him that he would be paroled when he had demonstrated his capability of being a "law abiding citizen" was an essential part of the plea negotiation. The request for reconsideration was denied.

Petitioner claims he has been the victim of two unconstitutional wrongs: 1) petitioner was denied release on parole through arbitrary action and application of an *ex post facto* law,

and 2) the application of the general deterrence ground for denial of parole to petitioner vitiated the voluntariness of his plea of guilty.

I.

The claim that petitioner's parole denial is unconstitutional as being arbitrary and an application of an *ex post facto* law is developed in two steps. First, petitioner argues that to the extent that the denial was founded on the rationale that he might commit another offense, this rationale is totally unsupported by the facts before the board; hence, denial of parole on this unsupported ground was an arbitrary and capricious act, contrary to due process of law. Second, the only basis for denial of parole which is supported by facts before the Parole Board is the general deterrence rationale that "release at this time would not deter others . . . from committing similar offenses in the future . . ."; however, the application of the general deterrence rationale to petitioner constitutes an *ex post facto* law in violation of Article 1, Section 10 of the U.S. Constitution. Inasmuch as we disagree with the second step of petitioner's argument, we shall assume — without deciding — the correctness of the first step.

In 1969 when petitioner was sentenced for voluntary manslaughter, the penalty for this offense was imprisonment in the penitentiary for from one to twenty years. Ill. Rev. Stat. ch. 38, §9-2(b) (1969). Plaintiff contends that in 1969 only the sentencing judge was empowered to impose punishment on a general deterrent theory; the judge could set a minimum sentence almost as high as the maximum sentence, with the view that the minimum sentence could be set in conformity with the judge's feelings regarding the necessary minimum length of incarceration required to serve the general deterrent effect of criminal sanctions. As of 1973, though, for a class 2

felony the sentencing judge could not set a minimum sentence to exceed one-third of the maximum sentence. Ill. Rev. Stat. ch. 38, §1003-3-3. Plaintiff argues that part of the trial judge's discretion has been delegated to the parole board, which itself is now vested with the power to apply its own view of general deterrence in denying parole.

To further bolster his argument regarding the bifurcated sentencing scheme of judge/parole board and rehabilitation versus deterrence, petitioner points to Rule 12 of the Parole and Pardon Board of the State of Illinois, in effect from 1962 to 1972, as evidence that the Parole Board was restricted to considerations of rehabilitation during the relevant years prior to 1973. The rule provides:

> If the members of the Parole and Pardon Board in conference determine that a prisoner serving an indeterminate term is entitled to parole, they shall enter an order for parole. If they determine that a prisoner is not a fit person to serve his sentence outside the penitentiary, a parole shall be denied, and such further orders entered as in the judgment of the members is deemed warranted.

While we concede the ingenuity of petitioner's counsel, we believe the scheme concocted is more "wishful thinking" than actuality. Nothing in the legislative history of Ill. Rev. Stat. ch. 38, §1003-3-5, speaks of shifting the consideration of factors of general deterrence from the trial judge to the Parole Board, nor would one expect to find such comments. Sentencing — be it by a judge or indirectly by a parole board — cannot be spliced into separate factors capable of independent consideration. Just as a judge could never realistically ignore the factor of rehabilitation in reaching his sentence, so could a parole board not ignore the deterrent effect of its decisions. It is inconceivable to this court, and in defiance of common sense, to impose such an interpretation on Ill. Rev. Stat. ch.

108, §203 (1969), the controlling parole statute in effect at the time of petitioner's sentencing. Surely the Illinois legislature never intended that the Parole Board be barred from considering the deterrent effect when deciding cases of release on parole.

In examining the Council Commentary which accompanies Ill. Rev. Stat. ch. 38, §1003-3-5, one notes that the new parole criteria "expand the vague charge to the Board to determine 'whether [the offender] is capable again of becoming a law-abiding citizen.'" While petitioner reads this remark as meaning that §203 has been enlarged to include the general deterrence rationale, the court thinks it quite clear that the new statute only makes more explicit the vague charge under which the Board labored.

Petitioner argues that any construction of §203 which would expand it to include the general deterrence rationale of present law would be an "unforeseeable judicial enlargement" of prior law, and operate precisely as an *ex post facto* law. *Bouie v. Columbia*, 378 U.S. 347, 357 (1964). We believe that our construction of §203 is not only not "unforeseeable", but the predictable and sensible one, given the nature of sentencing.

Petitioner's application for a writ of habeas corpus on this ground is denied.

II.

Petitioner also argues that he is in custody illegally as a result of an involuntary guilty plea. Overall claims that one of the conditions upon which he accepted the plea-bargaining agreement was that he be paroled, upon eligibility, if he had demonstrated that he was rehabilitated.

We agree with petitioner that when a guilty plea rests in any significant way upon a promise or agreement of a prosecutor or judge so that the same can be said to be a part of the inducement or consideration, the promise must be fulfilled. A plea of guilty made in reliance on an unfulfilled promise is not voluntarily made by the defendant. *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed. 2d 747 (1970); *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed. 2d 427 (1971). However, we decline to rule on this point because of petitioner's failure to exhaust state remedies.

Petitioner claims that he has no effective state remedy to exhaust because the Illinois Post-Conviction Hearing Act, Ill. Rev. Stat. ch. 38, §122 *et seq.* (1973) applies only to "criminal proceedings", which do not include parole. However, this aspect of petitioner's writ is not really about his denial of parole, but rather challenges validity of his guilty plea at his criminal trial.

As the court understands petitioner's argument herein, the construction of §203 becomes irrelevant. If Overall was promised, as a part of his consideration in the plea-bargaining contract, that he would be paroled upon eligibility if he was at that point rehabilitated, then the Parole Board was barred from considering the deterrence rationale whether they otherwise had the power to do so or not. Therefore, petitioner is not seeking herein a review of the Parole Board determination, or another re-hearing, but he seeks rather to vitiate his guilty plea because of an unfulfilled promise.

The law of Illinois is relatively clear that the Post-Conviction Hearing Act encompasses the challenge of the voluntariness of a guilty plea, even though the unfulfilled promise resulted at a proceeding years later. In *People v. Pier*, 51 Ill. 2d 96, 281 N.E.2d 289 (1972), the court examined the voluntariness of a guilty plea at a probation vocation hearing. The court said that "a defendant may raise in a post-conviction

petition issues of constitutional dimension that occurred not only in the proceeding which involved the determination of his guilt, but also those which arose in proceedings concerning the imposition of the sentence." *People v. Pier*, *supra* at 290.

To the extent that petitioner's claim for relief is based upon an unfulfilled promise in the plea bargain creating an involuntary guilty plea, we hold that petitioner has an unexhausted state remedy in the Post-Conviction Hearing Act. The petition for writ of habeas corpus is hereby denied.

Finally, we note that Overall is to appear before the Parole Board in April, 1975, and that petitioner may wish to expedite an appeal to avoid problems of mootness. Pursuant to F.R.A.P. Rule 22(b), 28 U.S.C.A., we hereby issue a certificate of probable cause in case petitioner should decide to pursue that course.

ENTER:

/s/ Abraham Lincoln Marcom
JUDGE

DATED: December 6, 1974

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FRANK WARE and
ELIZABETH WARE,
Plaintiffs,

v.

K. V. KAUFMAN, IRVING R. JAMES and GAYLE FRANZEN,
Defendants.

No. 80 C 3209

MEMORANDUM OPINION

Plaintiffs are prisoners in the custody of the State of Illinois. Frank Ware is serving concurrent sentences of 25-30 years for aggravated kidnapping and 10-20 years for rape. Elizabeth Ware is serving concurrent sentences of 20-30 years for aggravated kidnapping and 7-14 years for deviate sexual assault. Both convictions for both plaintiffs relate to the same incident in 1969. *See People v. Ware*, 11 Ill.App.3d 697, 297 N.E.2d 289 (1973). The Illinois Prisoner Review Board has twice refused to release plaintiffs on parole. The second parole denial for Elizabeth Ware occurred in March 1980; the second parole denial for Frank Ware occurred in December 1980.

In this section 1983 suit, plaintiffs allege that the Board failed to give a sufficient factual basis for the parole denials as required by the due process clause; that, in violation of the ex post facto clause, the Board applied a criterion to deny parole which was not effective at the time plaintiffs committed their crimes; that Kaufman's function as the Executive Director of

the Board is unlawful; and that defendants' failure to award plaintiffs both statutory and day-for-day good conduct credit violates the constitution. Defendants have filed a motion to dismiss. For the reasons hereinafter stated, we grant defendants' motion.

I.

A

The Illinois statutory guidelines for parole determinations are in section 3-3-5(c) of the Unified Code of Corrections.

> (c) The [Prisoner Review] Board shall not parole a person eligible for parole if it determines that:
>
> (1) there is a substantial risk that he will not conform to reasonable conditions of parole; or
>
> (2) his release at that time would deprecate the seriousness of his offense or promote disrespect for the law; or
>
> (3) his release would have a substantially adverse effect on institutional discipline.

38 U.S.C. §1003-3-5(c). The administrative rules of the Board define the factors to be considered in making each of those findings. For example, a determination that release of the candidate for parole "would deprecate the seriousness of his offense or promote disrespect for the law" must be "based on one or more of the following factors:"

> 1. The offense is one of murder, attempted murder or killing of an individual, robbery with a weapon, rape, indecent liberties, deviate sexual assault, aggravated kidnapping or kidnapping for ransom, armed violence, treason, aggravated arson, treason or calculated criminal drug conspiracy.

2. The aggravating as well as mitigating circumstances as described in Chapter 38, Sections 1005-5-3.1 and 1005-5-3.2, Illinois Revised Statutes.

To notify a prisoner of a decision to deny parole, the Board sends a form notice listing the three reasons given in the statute and the considerations defined in the regulations and checks the reason and factor or factors which were the bases for the denial of parole. In plaintiffs' case, the Board marked that their release would deprecate the seriousness of the offense or promote disrespect for the law and indicated that this determination was based on the offenses committed by plaintiffs (aggravated kidnapping, rape, deviate sexual assault).

Plaintiffs argue that the Board's use of this checklist, which merely recites the statutory and regulatory language and does not provide a more specific statement of facts supporting the denial, violates the due process clause. Plaintiffs seek as relief a "written statement by the fact-finders as to the evidence relied on and reasons" for the denial of parole. *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (due process requirements for parole revocation).

Even if plaintiffs have a constitutionally protected interest in their parole determination,[1] due process does not require

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[1] A constitutionally protected interest in parole determinations does not result from the possibility of parole but depends upon the language of the state parole statute. *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 8-12 (1979). In *Greenholtz*, the Supreme Court accepted the inmates' argument that the necessary expectancy of parole was created by the Nebraska statute's requirement that an inmate "shall" be paroled "unless" certain findings were made. 442 U.S. at 11-12. The Illinois statute is not structured in that affirmative fashion. No set of facts are defined which mandate a decision favorable to the prisoner. The statute does not say an inmate "shall" be released under any condition but only defines when he shall not be. Because of the almost total discretion given to the Board, a parole determination in Illinois does not necessarily trigger due process protections.

the Board to elaborate on the reasons for denying parole. *Greenholtz v. Inmates of the Nebraska Penal and Corrections Complex*, 442 U.S. 1 (1979). The court of appeals in *Greenholtz* had held that "'each inmate to whom parole is denied must be given a full and fair explanation in writing, of the evidence relied upon and the reasons for denial of parole.'" *Inmates of the Nebraska Penal and Correctional Complex v. Greenholtz*, 576 F.2d 1274, 1284 (5th Cir. 1978) (quoting the district court). In reversing that holding, the Supreme Court stated that to require a parole board to specify the particular evidence in the inmate's file or at his interview on which it rests the denial "would tend to convert the process into an adversary proceeding and to equate the Board's parole-release determination with a guilty determination." 442 U.S. at 15-16. After "the full panoply of due process" at the trial preceding the imprisonment, the Court reasoned that an adversary hearing is not necessary to deny parole and continue confinement. *Id.* at 14. Moreover, emphasizing that "due process 'is flexible and calls for such procedural protections as the particular situation demands,'" *id.* at 12, quoting *Morrissey v. Brewer*, 408 U.S. at 481, the Supreme Court held that a requirement of a full explanation is inimicable to the parole determination which is necessarily subjective in part and predictive in part," 442 U.S. at 13, and not necessarily based on specific facts. *Id.* at 14.

Although in this case the Illinois parole procedures are involved and not the Nebraska procedures which were at issue in *Greenholtz*, the Supreme Court's decision in *Greenholtz* that a summary of the evidence relied on to deny parole was not required by due process is controlling here. *Greenholtz* was based on the "very broad discretion" granted the paroling authority in the Nebraska statute. 442 U.S. at 13. Since the Illinois statute also gives great discretion to the Illinois Prisoner Review Board, *see, e.g., Tucker v. Kotsos*, 42 Ill.App.3d 812, 818, 356 N.E.2d 798, 804 (1976), the rationale of *Greenholtz*

applies to defeat the claim that a written statement of the evidence and reasons relied on for the denial are essential to due process.

None of the case or statutory authority which plaintiffs cite in their argument is applicable to this suit. Some of the cases were decided prior to *Greenholtz*, and, however persuasive we may find their rationale for requiring a full explanation for parole denials, the Supreme Court's contrary decision in *Greenholtz* controls our determination in this case. Some of the cases on which plaintiffs rely involve the procedures before the federal parole board. Those cases are not relevant to plaintiffs' claim because they were decided not on the basis of the due process clause which is the only authority applicable to plaintiffs' claim but on the basis of the federal statute which creates the statutory rights of federal prisoners but does not define the constitutional rights of state prisoners. Even if, as plaintiffs argue, the Board's checklist violates the Illinois statute and regulations which require a "concise statement of facts supporting the reason or reasons" for denying parole, Rule Governing Parole, p. 7, plaintiffs do not state a claim for violation of a federally protected right; violation of a state procedural rule does not result in a federal cause of action under section 1983 where, as here, the state procedure is not mandated by the federal constitution. Because due process does not require a summary of the facts which led to a denial of parole, we dismiss that count of the complaint.[2]

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[2] In their memorandum in opposition to defendants' motion plaintiffs charge that they were denied parole because of Frank Ware's efforts to bring prison conditions and other problems to the attention of journalists, legislators, and others. A decision to deny parole "made in retaliation against or so as to hinder the exercise of federally protected rights" is actionable. *Williams v. Rhoden*, 629, F.2d 1099, 1103 (5th Cir. 1980).

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II.

Plaintiffs contend that defendants violated the ex post facto clause by deciding the question of plaintiffs' parole release on the basis of provisions concerning parole which were not in effect when plaintiffs' committed their crimes. Plaintiffs argue that the parole criteria listed in the new statute are substantive changes from the criteria formerly applied by the paroling authority. Specifically, they challenge the statute's requirement that the Board deny parole if the prisoners' "release at this time would deprecate the seriousness of his offense or promote disrespect for the law ..." Ill.Rev.Stat., ch. 38, §1003-3-5(c). An alteration of role provisions violates the ex post facto clause if it is "retrospective and more onerous than the law in effect on the date of the offense." *Weaver v. Graham*, 101 S.Ct. 960 (1981).

In an earlier habeas corpus petition brought by plaintiff Elizabeth Ware, we rejected the ex post facto claim raised by plaintiffs in this suit.

> The adoption of statutory parole release guidelines that do not significantly alter the discretion afforded parole authorities under prior law does not violate the prohibition against ex post facto law. *Rifai v. United States Parole Commission*, 586 F.2d 695, 699 (9th Cir. 1978); *see Shepard v. Taylor*, [556 F.2d, 648, 654 (2nd Cir. 1977)]. Therefore, we must examine the law as it existed when petitioner committed her crime to determine if Illinois parole authorities were

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However, since a determination that plaintiffs were unconstitutionally denied parole would result in their release, plaintiffs' claim must be brought in a habeas corpus petition, *Preiser v. Rodriguez*, 411 U.S. 475 (1973), unless plaintiffs can factually amend their complaint to seek monetary damages only for the alleged unconstitutional parole denial.

empowered to consider the nature of a prospective parolee's offense as a factor in its parole release decisions.

In 1969, the Illinois statute governing parole set forth a definite formula for determining when a prisoner became eligible for parole release consideration. Ill.Rev.Stat., ch. 38, §123-3 (1967) (repealed). Once a prisoner reached her eligibility date, she had a right to have her application for parole release entertained by the Illinois Parole and Pardon Board ("Pardon Board"), the predecessor of the Review Board. *People ex rel. Abner v. Kinney*, 30 Ill.2d 201, 206, 199 N.E.2d 651, 654 (1964). But the Parole Board was not obliged to grant parole to every prisoner who attained eligibility for parole release consideration. Indeed, an Illinois prisoner had no enforceable right to be paroled any time prior to the expiration of her sentence. *People ex rel. Jones v. Brantley*, 45 Ill.2d 335, 338, 259, N.E.2d 651, 654 (1970). The decision as to when to grant parole to an eligible prisoner was left to the broad discretion of the Parole Board. Ill.Rev.Stat., ch. 38. §123(1)(a)(1967) (repealed); *see People ex rel. Jefferson v. Brantley*, 44 Ill.2d 31, 33, 253 N.E.2d 378, 380 (1969).

Although no statutory guidelines delineating specific reasons for the denial of parole existed before the enactment of the Code, the severity of the crime was, by statute, one of the factors the Parole Board could consider in deciding whether a prisoner was ready for release into society. Under Ill. Rev.Stat., ch.108, §203 (1967) (repealed), the sentencing judge and prosecuting attorney were required to prepare for the Parole Board's review an

official statement of the facts and circumstances surrounding the crime for which a committed offender was convicted. This official statement was furnished to the Parole Board to assist it in the exercise of its discretionary authority to determine whether a person in custody was "capable again of becoming a law-abiding citizen." It is thus clear that the inclusion of seriousness of the offense among the standards for the denial of parole under the Code did not significantly increase the power of Illinois parole authorities; it merely clarified the discretionary power already delegated to the Parole Board under prior law. Therefore, finding that petitioner has not suffered greater punishment as a result of the 1973 parole release guidelines, we reject her claim that she was denied parole on the basis of an *ex post facto* application of state law.

Ware v. Geesen, No. 80 C 5427, p. 4-6 (N.D.Ill. Dec. 4, 1980). For the reasons stated in that previous opinion, we dismiss the count of the present civil rights complaint which alleges that retrospective application of Ill. Rev. Stat., ch. 38, §1003-3-5(c) violates the ex post facto clause.[3]

III.

Plaintiffs' claim that defendant Kaufman's position as Executive Director of the Illinois Prisoner Review Board renders

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[3] Plaintiffs also seem to complain that the ex post facto clause was violated beacuse the body which made the decision on parole was changed from the Parole and Pardon Board, in existence at the time plaintiffs committed their crime, to the new Illinois Prisoner Review Board. Such a nomenclature, procedural, nonsubstantive claim could not violate the ex post facto clause.

the Board unlawfully constituted has no merit. Their basis for that claim is a letter signed by Kaufman notifying Frank Ware that his request for review of the Board's parole denial had been rejected. Plaintiffs claim the letter should have been answered by the Chairman of the Board. The body of the letter says:

> Your request for a rehearing was presented to the members of the Board for consideration.
>
> After careful review of your request, along with the entire file in the matter, it was determined that further consideration is not warranted at this time. The reason for denial is as follows: "The Board finds the information submitted does not require a rehearing."

Memorandum of Law in Support of Defendants' Motion to Dismiss or for Summary Judgment, Exhibit 3.

The letter from Kaufman to Frank Ware makes clear that Kaufman was merely acting as the Board's messenger not usurping the authority of the Chairman of the Board or impeding the Board's independent decision-making process. The decision was the Board's not Kaufman's. Kaufman's role was simply to notify Ware of the Board's decision. Furthermore, plaintiffs do not have a constitutional right to have their letters from the Board signed by the Chairman nor to have the Board or the Chairman consider their request for a rehearing. Plaintiffs' claim is frivolous.

IV.

Plaintiffs argue that defendants have not deducted from plaintiffs' sentences the amount of good time credit to which they are entitled. They claim they should receive both statutory

good time, as provided by the statute in effect when they committed their crimes, and day-for-day good time, as provided by the statute in effect at present and since February 1, 1978.

Under the old statute,

> [t]he Department was required to prescribe, at a rate within its discretion, a schedule of good-conduct credits for good behavior .... These were known as "statutory good time credits." The Department was also empowered to award good-conduct credits to prisoners who performed work assignments or participated in other Department programs ... These credits were known as "compensatory good time credits."

Johnson v. Franzen, 77 Ill.2d 513, 397 N.E.2d 825,827 (1979). Effective February 1, 1978, the new statute changed the method for computing good time.

> The Code no longer gives the Department authority to award compensatory good-conduct credits ... and no longer gives the Department the authority to award statutory good-time credits at a discretionary rate ... The Code expressly directs the Department to prescribe rules and regulations providing for good-conduct credits on a day-for-day basis. (Ill. Rev. Stat., ch. 38, §1003-6-3).

Id. at 516, 397 N.E.2d at 826. In *Johnson v. Franzen*, the Illinois Supreme Court held that, for time served after February 1, 1978, defendants must give day-for-day credit to prisoners like the plaintiffs who committed their crimes before that provision was enacted as well as to prisoners who violated the law after the statute became effective. *Id.* at 522, 397 N.E.2d at 828. According to an affidavit filed by defendants, plaintiffs' sentences have been recomputed in accordance with that opinion.

Nothing in the statute or in *Johnson v. Franzen*, entitles plaintiffs to both statutory good time credit as defined by the old statute *and* day-for-day good time credit as prescribed by the new statute. Plaintiffs argue that the new legislation could not take away their right to statutory good time credit, but the new provision did not revoke their right to good time, it only changed the method for crediting good time by taking away the Department's discretion and establishing a rate of one day of good time credit for one day of imprisonment.

Furthermore, such a change does not necessarily violate the constitutional prohibition against imposing additional punishment to that prescribed at the time the crime was committed which is contained in the ex post facto clause. A state can alter the method of awarding good time and apply the new method to prisoners who committed crimes before the change if the effect of the new rule is not more onerous than the law in effect on the date of the prisoner's offense. *Cf. Weaver v. Graham*, 101 S.Ct. 960 (1981) (Florida Statute reducing the amount of good time available for good conduct is unconstitutional when applied retroactively).

Plaintiffs do not allege that a system of day-for-day good time credit is less beneficial to them than the system of statutory and compensatory good time previously administered by the Department nor would such an argument withstand analysis. The old system of statutory good time provided for less than day-for-day credit, and the system of compensatory good time provided a maximum credit of only seven and one-half days per month. *Johnson v. Franzen*, 77 Ill.2d at 517, 397 N.E.2d at 827. Furthermore, according to an affidavit filed by the defendants, if recomputing good time according to the dictates of *Johnson* would for some reason have resulted in less credit than that already awarded a particular prisoner under the old method, the day-for-day rate was not applied for the time prior to the *Johnson* decision. Since the new system does not reduce the

amount of good time available, application of the day-for-day rate only is not unconstitutional.[4]

In light of the foregoing, defendants' motion to dismiss is granted. An appropriate order will be entered.

/s/ _____
United States District Judge

DATED: October 13, 1981

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[4] Plaintiffs contend in addition, however, that white prisoners were granted both statutory and day-for-day good time credits while black prisoners were not. Although defendants are not required to grant both types of good time to any prisoner, they cannot give both types to some prisoners and refuse to give both to others in an arbitrary or racially discriminatory manner. If plaintiffs can prove discrimination, they may be able to receive more good time on the same basis as white prisoners. That relief, since it would shorten the length of their confinement, cannot be granted in a section 1983 suit but must be the basis for a habeas corpus petition. *Preiser v. Rodriguez*, 411 U.S. 475 (1973). Plaintiffs may, however, recover monetary damages for the violation of their equal protection rights in a section 1983 suit. Plaintiffs may amend their complaint to allege the facts, if they can do so, on which they base the conclusion that identified officials granted white prisoners both statutory and day-for-day good time credits, seek such monetary relief only, and name the appropriate officials and white prisoners.